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No. 316

In the Supreme Court of the United States

OCTOBER TERM, 1939

J. LAWRENCE FLY, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN, AND PAUL A. WALKER, PETITIONERS

v.

PAUL R. HEITMEYER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	8
Summary of argument	9
Argument:	
I. The court below had no authority or occasion by writ of mandamus to control the proceedings before the Commission subsequent to its reversal on a question of law	10
II. The question was res adjudicata	11
Conclusion	13

CITATIONS

Cases:	
Baker v. *Cummings*, 181 U. S. 117	13
Baltimore S. S. Co. v. *Phillips*, 274 U. S. 316	13
Cromwell v. *County of Sac*, 94 U. S. 351	13
Fayerweather v. *Ritch*, 195 U. S. 276	13
Louis v. *Brown Township*, 109 U. S. 162	11
Nalle v. *Oyster*, 230 U. S. 165	11, 13
North Carolina R. R. v. *Story*, 268 U. S. 288	13
Oklahoma v. *Texas*, 256 U. S. 70	13
Pottsville Broadcasting Company v. *Federal Communications Commission*, 105 F. (2d) 37, No. 265, this Term	6, 9, 10
Southern Pacific Railroad v. *United States*, 168 U. S. 1	13
United Shoe Machinery Co. v. *United States*, 258 U. S. 451	13
Virginia-Carolina Chemical Co. v. *Kirven*, 215 U. S. 252	13
Miscellaneous:	
Rule 106.46 of Rules of Practice and Procedure of the Federal Communications Commission	8

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 52) is reported in 105 F. (2d) 41.

JURISDICTION

The order of the United States Court of Appeals was entered on May 24, 1939 (R. 70), and a petition to vacate an order granting a writ of mandamus and a motion for leave to appear and be heard were denied July 12, 1939 (R. 90). The petition for a writ of certiorari was filed August 24, 1939, and granted on Oc-

tober 16, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. The Commission denied respondent's application for a construction permit for a radiobroadcast station on the sole ground that it was not financially responsible. The court below reversed and remanded with instructions to proceed in accordance with its opinion. The Commission set the remanded cause for further hearing in consolidation with a hearing on two other applications. The question is whether the court below has power to issue a writ of mandamus to compel the Commission to reconsider respondent's application on the original record and without regard to the subsequent applications.

2. Whether the court below, after an order denying respondent's motion for a rule to show cause why a hearing should not be held on the original record and on a noncomparative basis, had the power in a subsequent and independent proceeding between the same parties to grant the same relief through the issuance of a writ of mandamus.

STATUTE INVOLVED

The applicable provisions of the Communications Act of 1934 are printed in the Appendix to the brief for the petitioner in *Federal Communications Commission* v. *The Pottsville Broadcasting Company*, No. 265, this Term.

STATEMENT

On March 25, 1935, Paul R. Heitmeyer filed an application with the Federal Communications Commission for a construction permit to erect a new radio broadcast station in Cheyenne, Wyoming. (R. 1, 42.) The Commission designated this application for hearing, together with the application of the Wyoming Radio Educational Association, which desired a permit to construct a similar station in the same city. Hearing was held on October 30, 1935, before an examiner who recommended in his report that Heitmeyer's application be granted. (R. 42–43.) Upon consideration by the Commission, however, Heitmeyer's application was denied on May 1, 1936, upon the sole ground of failure to establish the requisite financial qualifications. (R. 3–6.) On June 29, 1936, Heitmeyer appealed under Section 402 (b) of the Communications Act of 1934 to the United States Court of Appeals for the District of Columbia from the Commission's order denying his application for a construction permit. The court reversed the Commission's decision and remanded the case on December 27, 1937. (R. 14.) The opinion recited that "This does not mean that it is directed to issue a permit to the appellant. It is not the function of this court 'to revise the action of the Commission from an administrative standpoint and to make an administrative judgment * * * the Commission in its further action is to respect and follow the * * * determination of the questions of law' by this court." (R. 13.)

On January 15, 1938, Heitmeyer petitioned the Court of Appeals for an order which would stay the Federal Communications Commission, pending final decision of the cause, from granting a construction permit or license that would prevent or seriously interfere with the granting of petitioner's application. He pointed out that while the case was pending in that court another application for a station in Cheyenne had been filed by the Frontier Broadcasting Company; that a third applicant, the Cheyenne Radio Corporation, had filed an application requesting the same facilities requested by Heitmeyer, and that the granting of either of the two other applications would seriously prejudice his rights. (R. 14–16.) The court, on January 20, 1938, ordered that the Commission stay all further proceedings relating to the granting of a permit for a broadcasting station at Cheyenne, Wyoming, until such time as final determination could be had of Heitmeyer's application. (R. 16.)

The Commission, on March 3, 1938, moved to vacate the stay of January 20, 1938, on the ground that it was its duty under the statute to hear the related applications on a comparative basis. (R. 17–19.) Heitmeyer on March 7, 1938, filed a motion to deny the petition which urged that he was entitled to a prior, noncomparative consideration on the record as originally made before his appeal to the court. (R. 20–25.) The Court of Appeals, on March 17, 1938, granted the Commission's motion to vacate the stay of January 20, 1938. (R. 29.) Thereupon, the Commission on April 20, 1938,

directed that the record in the case be reopened for further hearing before an examiner, consolidated with a hearing *de novo* which was ordered upon the applications of the Frontier Broadcasting Company and the Cheyenne Radio Corporation.[1] (R. 35, 36.)

Heitmeyer, on April 27, 1938, filed a motion in the court below, praying that the court issue a rule upon the Commission to show cause why it had not complied with the judgment of the court in reversing the Commission's action; he contended that the Commission had no power to take any action other than to reconsider the record as originally made (R. 30–33). Opposition to this motion was filed by the Commission on April 30, 1938 (R. 33). The court on May 12, 1938, denied Heitmeyer's motion for the rule (R. 38). On May 23, 1938, the court denied Heitmeyer's motion (R. 39) to stay the effective date of the denial of his motion for rule to show cause, so that he could apply for certiorari to this Court (R. 40).

Heitmeyer then filed a bill of complaint in the United States District Court for the District of Columbia on May 31, 1938, praying that the Commission be permanently enjoined from granting any construction permit to any other applicant for a radio station at Cheyenne until after the Commission had rendered a decision on the record as made at the original hearing on Heitmeyer's application. (R. 40–50.) The Commission moved to dismiss on June 7, 1938. (R. 50.) The motion

[1] This latter application has been dismissed and is no longer involved in these proceedings.

was denied June 30, 1938. (R. 51.) On April 3, 1939, the Court of Appeals, on a special appeal, held that the lower court was without jurisdiction and reversed and remanded the case with instructions to dismiss the bill, without prejudice to the application of Heitmeyer to the Court of Appeals for a writ of mandamus. The opinion pointed out that the court's decision in the *Pottsville* case was controlling and that Heitmeyer should have applied to the Court of Appeals for a writ of mandamus.[2] (R. 52–54.) Petition for rehearing was filed by the Commission on April 20, 1939, requesting the court to delete the language from the court's opinion which stated that Heitmeyer was entitled to apply for a writ of mandamus; this was on the ground that Heitmeyer had previously by a motion for rule to show cause sought this remedy unsuccessfully, and the matter was therefore *res adjudicata*. (R. 55–64.) Heitmeyer filed an opposition to the Commission's petition for a rehearing on April 25, 1939. (R. 64.)

While the petition for rehearing was pending, Heitmeyer in the appeal from the District Court, filed a petition for mandamus on May 3, 1939. (R. 66.) The Commission filed an opposition on May 8, 1939, simply pointing out that the petition for mandamus was filed in the wrong case. (R. 68–69.) The court denied the Commission's petition for rehearing on May 23, 1939, and issued an order directing the issuance of a writ of mandamus on May 24, 1939. (R. 70.) On May

[2] *Pottsville Broadcasting Company* v. *Federal Communications Commission*, 105 F. (2d) 37, pending on writ of certiorari, No. 265, this Term.

25, 1939, on its own motion and without notice to the parties, the court directed that the entries respecting the petition for writ of mandamus be transferred from the docket pertaining to the appeal from the District Court to the original docket. (R. 71.) On the same day, May 25, 1939, the court below stayed the issuance of the writ for thirty days. (R. 71.) The Commission on June 9, 1939, filed a petition to vacate the court's order of May 24, 1939, stating that the order had been entered without the Commission's having been given an opportunity to file briefs or to appear and be heard. (R. 72–74.) On June 19, 1939, Heitmeyer filed his opposition to the Commission's petition to vacate the order. (R. 74.) The court suspended its order on June 20, 1939, for a period of ten days, with leave to the Commission within five days to file its grounds of opposition and with leave to Heitmeyer to file an answer thereto within the succeeding five days. (R. 76.) The Commission filed its opposition on June 26, 1939. (R. 76.) The Commission filed another petition, on July 6, 1939, to vacate or further suspend the order and also a motion for leave to appear and be heard (R. 85, 87); Heitmeyer filed an opposition on July 11, 1939. (R. 89.) The court on July 12, 1939, entered an order denying the Commission's petition and motion and directing that the original order of mandamus issued on May 24, 1939, continue in full force and effect. (R. 90.)

This Court granted the petition for a writ of certiorari on October 16, 1939, and on November 13, 1939, substituted J. Lawrence Fly as party petitioner in the place of Frank R. McNinch, resigned.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In misinterpreting Section 402 (e) of the Communications Act of 1934, providing that "review by the court shall be limited to questions of law";

2. In issuing a writ of mandamus to control the purely administrative functions of the Commission;

3. In assuming that an appeal from the Commission should have the same effect and be governed by the same rules as an appeal from a lower federal court to an appellate court;

4. In assuming that the Commission was not conforming and would not conform fully and properly with the previous decision of the court below in this case;

5. In misconstruing the rules of practice of the Commission, particularly Rule 106.4 applicable to the fixing of dates for hearings on conflicting applications for related matters;

6. In subordinating the interests of the public in the administration of the Communications Act of 1934 to the private interest of a particular applicant who happened to be the first to file for given facilities and also has obtained judicial review of the Commission's denial of its application;

7. In assuming that the court, after entering its judgment under Section 402 (e) of the Communications Act of 1934, has authority to control the Commission's action in respect of matters not in issue before the court or included in its judgment of reversal;

8. In issuing a writ of mandamus where the petitioner had not exhausted its administrative remedies, had not shown a clear right to the relief or any threat of injury if the writ were denied, and asked relief which contradicted the statutory duty of the Commission;

9. In directing the Commission to set aside its order of April 20, 1938, which designated Heitmeyer's application for hearing in consolidation with the application of Frontier Broadcasting Company;

10. In commanding the Commission to hear and reconsider Heitmeyer's application on the basis of the record as originally made;

11. In readjudicating an issue previously determined and therefore *res adjudicata.*

SUMMARY OF ARGUMENT

I

For the reasons stated in the brief for the petitioner in *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* No. 265, this Term, the court below had no authority or occasion by writ of mandamus to control the proceedings before the Commission subsequent to its reversal on a question of law.

II

The court below had before, in independent proceedings, determined against the respondent the same issue as that now presented. Its decision was, therefore, *res adjudicata* of the petition for a writ of mandamus.

ARGUMENT

I

THE COURT BELOW HAD NO AUTHORITY OR OCCASION BY WRIT OF MANDAMUS TO CONTROL THE PROCEEDINGS BEFORE THE COMMISSION SUBSEQUENT TO ITS REVERSAL ON A QUESTION OF LAW

1. Our argument on this score is presented in the brief for the petitioner in *Federal Communications Commission v. Pottsville Broadcasting Co.*, No. 265, this Term, to which the Court is respectfully referred.

2. There are, however, two circumstances in this case which differ from the facts presented in No. 265.

The Commission, in denying the respondent's application because he had failed to show financial responsibility, did not make affirmative findings as to issues upon which its judgment would have been favorable to the respondent, except to decide that he is a citizen and is technically qualified (R. 4; see R. 5). In the *Pottsville* case, on the other hand, the Commission had found need for a local station in Pottsville and sufficient financial patronage and local talent (see brief for petitioner in No. 265, pp. 24, 45).

In the present case, the Commission directed that the record be opened for further hearing before an examiner, and consolidated with a hearing *de novo* which was ordered upon the two pending conflicting applications (R. 35). This action was taken on April 20, 1938, and may well have been indicated by the fact that it had been two and one-half years since the original hearing on October 30, 1935, with respect to respondent's application (R. 42). In the *Pottsville* case, on the other hand, the

Commission merely set the application for oral argument before the Commission on the same day that argument was to be heard on the conflicting applications, as to which the hearings had already been completed.

Neither of these two variations seems in any way to be material to the argument presented by the petitioner in No. 265 and adopted herein.

II

THE QUESTION WAS *RES ADJUDICATA*

The court below, in an independent proceeding in which respondent requested the same relief from the same order of the Commission, denied respondent the relief which it has now granted in this proceeding. Since the principles of *res adjudicata* govern mandamus proceedings as fully as other proceedings, *Louis* v. *Brown Township*, 109 U. S. 162, 166; *Nalle* v. *Oyster*, 230 U. S. 165, 180–182, respondent's petition for a writ of mandamus should have been denied.

The general question was initially presented to the court below by a motion to vacate a stay order entered in connection with respondent's appeal. The court below granted this motion and vacated (R. 29) an order which had been entered, after the reversal on the appeal, staying the Commission from any further proceedings with relation to a station license at Cheyenne, Wyoming, until final action was had on respondent's application (R. 16–17). The petition for the stay (R. 14), the motion to vacate it (R. 17), respondent's opposition to this motion (R. 20–25), and the reply of the Commission (R. 25–29) each shows that the issue then before the court was whether the Commission should consider all the

pending applications upon a comparative basis or whether respondent's application should first be considered alone. Subsequently, on April 20, 1938, the Commission entered the order which is complained of in the instant proceeding (R. 35). Respondent then moved the court below for a rule to show cause why the Commission should not act upon his application on the basis of the record made prior to his appeal without regard to the pendency of conflicting applications. The issues (involving the same order of the Commission as is involved in this case), as shown by the motion (R. 30–33) and the Commission's opposition (R. 34–36), were also the same as those presented in the instant mandamus proceeding. The court below denied respondent's motion for the rule and also denied a request by respondent for a stay pending review by this Court (R. 38, 39). No further proceedings were had in that case.

The writ of mandamus was issued in an independent proceeding. It was instituted by a bill for injunction in the District Court (R. 40–50), which the court below ordered dismissed (R. 54). Subsequently in that proceeding, respondent filed with the court below a petition for a writ of mandamus (R. 66), which the court granted (R. 70) and, the following day, ordered transferred to the original docket (R. 71).

The petition for rehearing filed by the Commission pointed out that the issues were *res adjudicata* (R. 60–63); this ground had not been raised earlier because the Commission considered it sufficient in opposition to the petition for a writ of mandamus to point out that it had been filed in the wrong proceeding (R. 68–69).

Settled principles of *res adjudicata* show that the court could not in a subsequent action between the same parties undertake to reexamine the same issues or to grant relief the same in substance as that which it had earlier denied. See *Cromwell* v. *County of Sac*, 94 U. S. 351, 352; *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 48–52; *Baker* v. *Cummings*, 181 U. S. 117; *Fayerweather* v. *Ritch*, 195 U. S. 276, 300–301; *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252; *Nalle* v. *Oyster*, 230 U. S. 165, 181; *Oklahoma* v. *Texas*, 256 U. S. 70; *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 458–459; *North Carolina R. R.* v. *Story*, 268 U. S. 288; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order and judgment of the court below should be reversed, with instructions to dismiss respondent's petition for a writ of mandamus.

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